IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8697
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

GREGORY ALLEN SCHRADER
and
KAREN LEDBETTER SPEARS,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Texas
(W-91-CR-101-11)

(September 23, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Gregory Schrader appeals his sentence following his conviction of conspiracy to distribute amphetamine and possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a) and 21 U.S.C. § 846. Karen Spears appeals her conviction of, and

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

sentence for, conspiracy to distribute and possession with intent to distribute amphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Finding no error, we affirm.

I.

The defendants contend that the district court erred in calculating the amount of drugs used for sentencing purposes. A district court's factual findings concerning the amount of drugs used to calculate a criminal sentence are reviewed for clear error. United States v. Devine, 934 F.2d 1325, 1337 (5th Cir. 1991), cert. denied, 112 S. Ct. 954 (1992). "[M]atters relevant to sentencing rather than to guilt or innocence must be shown only by a preponderance of the evidence." United States v. Woods, 907 F.2d 1540, 1543 (5th Cir. 1990), cert. denied, 498 U.S. 1070 (1991). In sentencing determinations, the court is not bound by the rules of evidence and may consider any relevant evidence without regard to its admissibility, provided the information has sufficient indicia of reliability. U.S.S.G. § 6A1.3(a). "The defendant bears the burden of demonstrating that information the district court relied on in sentencing is materially untrue," including information in the presentence investigation report ("PSR"). United States v. Vela, 927 F.2d 197, 201 (5th Cir.) (internal quotations and citations omitted), cert. denied, 112 S. Ct. 214 (1991).

"Under the guidelines, the base offense level can reflect quantities of drugs not specified in the count of conviction if they `were part of the same course of conduct or part of a common

scheme or plan as the count of conviction.'" United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990) (citations omitted). Furthermore, the quantity drugs involved in a conspiracy that are attributable to a particular defendant for sentencing purposes includes those quantities reasonably foreseeable by him. United States v. Puma, 937 F.2d 151, 159-60 (5th Cir. 1991), cert. denied, 112 S. Ct. 1165 (1992).

A.

Schrader argues that no factual basis exists to support the finding concerning four pounds of the total quantity (approx. 10 pounds) of methamphetamine/amphetamine (speed) for which he was sentenced. Schrader's PSR stated that he had purchased large amounts of speed from co-defendant Joseph Dulock. Co-defendant Bass observed Schrader purchase two ounces of speed from Dulock on four separate occasions. During a three-month period in 1990 and 1991, Schrader would arrive at Dulock's automobile shop two or three times a week and go into the office with Dulock, and the office door would be locked. The office door was locked only when Dulock was conducting a drug transaction. After Schrader would leave Dulock's office, he (Schrader) would open the hood of his vehicle and apparently stash the drugs purchased from Dulock. Bass estimated the total amount of drugs purchased by Schrader from Dulock to be 4.5 pounds.

Bass's trial testimony corroborated this information. Schrader purchased drugs from Dulock in late 1990 and early 1991.

Bass witnessed four separate transactions involving two ounces each. During other meetings in late 1990 and early 1991, Schrader and Dulock would go into Dulock's office, and the door would be locked. According to Bass, the only time Dulock locked the office door "was when he was selling drugs." During the "two or three months after" the four transactions Bass actually witnessed, he was not allowed in the office with Schrader and Dulock. Bass also testified that after Schrader left the locked-door session, "he would raise his [car] hood and put something underneath the hood of his car in a little black container he had under there. So I (Bass) guessed it was drugs, I really don't know what it was[.]"

Bass based his estimate of the amount of drugs transacted between Dulock and Schrader upon the number of times the office door was locked and upon the fact that Schrader had bought two ounces on each of the four occasions Bass witnessed. Bass admitted that he was estimating the quantity of drugs Schrader purchased, other than the four two-ounce transactions actually witnessed. He also testified that he did not know whether drug transactions actually occurred during each meeting, but they usually did "when [Dulock] lock[ed] the [office] door."

The district court "found Mr. Bass' testimony to be particularly credible . . . ." The court agreed with defense counsel that Bass "finally used the word `guess,' [but] that was after an extensive cross-examination . . . ," and Bass "agreed to use the term that [defense counsel] insisted on using." In addition to the district court's finding concerning Bass's credibility, the

district court further found "that the probation officer's estimation in the Pre-Sentence Report is appropriate and correct . . . ."

The district court's factual finding concerning the reliability of the estimate provided by Bass concerning the amount of speed Schrader purchased from Dulock was not clearly erroneous. See United States v. Bethley, 973 F.2d 396, 400 (5th Cir. 1992), cert. denied, 113 S. Ct. 1323 (1993). Furthermore, Schrader has failed to offer evidence rebutting Bass's testimony, other than to allege its improbability. Schrader offers no testimony concerning what actually transpired during the locked-door sessions with Dulock. His argument is unavailing.

B.

Spears was held accountable for eight pounds of speed. She objected to the inclusion of four pounds delivered by Mike Royals to her boyfriend, Pat Maxwell, during a one-year period of co-habitation during 1988 and 1989. She maintains that only four pounds should be attributed to her because she had no knowledge concerning the drugs supplied to her "live-in" boyfriend, Maxwell.

While Spears asserts that U.S.S.G. § 1B1.3(a)(1), comment. (n.2), pertaining to jointly-undertaken criminal activity, requires a conclusion that she was involved with only four pounds of speed, she is mistaken. In determining the quantity of drugs attributable to a defendant, a district court is "entitled to consider conduct of others in furtherance of the execution of the jointly-undertaken

criminal activity that was reasonably foreseeable by the defendant." United States v. Kinder, 946 F.2d 362, 366 (5th Cir. 1991) (internal quotation and citation omitted), cert. denied, 112 S. Ct. 1677 (1992). A long-term relationship with the leader of a drug conspiracy, even when coupled with a relatively small participation in the distribution scheme, is sufficient to hold the defendant responsible for the total amount of drugs involved in a drug operation. Devine, 934 F.2d at 1337-38.

The district court specifically found that the four pounds Royals distributed to Maxwell "was reasonably foreseeable" to Spears. Royals was the kingpin of the speed distribution operation. According to the PSR, Spears met Royals in 1988. Spears lived with Maxwell, during which time Royals distributed approximately three to four pounds of speed to Maxwell. Although Spears may have been at her legitimate job during many of the transactions between Royals and Maxwell, the PSR states that "reports indicate Spears was well aware of the association between Maxwell and Royals and was actively a part of the receipt of [the speed]."

Royals testified that (1) he did not know whether Spears knew he was selling drugs to Maxwell; (2) she was never there when he distributed drugs to Maxwell; and (3) he knew Maxwell was careful not to distribute drugs when Spears was present. He also testified that he did not know whether Spears knew about the drugs, and he understood that she did not approve of drug trafficking activities occurring "at her house."

Royals also testified, however, that he had known Spears for

approximately three years and began distributing speed to her after she and Maxwell split up. Spears initially received approximately one-quarter of a pound the first time she received speed directly from Royals and subsequently received larger quantities. Royals estimated that from late 1988 through June 1991, he sold approximately four pounds of speed directly to Spears. He further testified that Spears approached him to obtain the speed and that he guessed "she just knew, you know, I had something to do with it."

Spears reportedly dealt speed out of her home, which contained a locked closet known as a "shooting gallery" where drug customers could ingest their drugs for a fee. The closet was supplied with the necessary items, including syringes, bandages, and drugs. Corroborated confidential information bolstered the supposition that Spears was involved, albeit indirectly, with the drugs Royals dealt directly to Maxwell. Furthermore, Spears was one of four persons Royals dealt with directly.

Additionally, Spears lived with co-defendant Mooring after his release from Texas state prison. Sandra Shook stated that although she did not personally know Spears, she had spoken with her on the phone when she (Shook) had attempted to contact Mooring regarding drug activity. Spears was also an associate of co-defendant Rogers, whom she had known since 1983.

The PSR and trial transcripts indicate that the four pounds of speed Royals distributed to Maxwell was reasonably foreseeable to Spears. The district court's finding is not clearly erroneous.

II.

Spears argues that the district court erred in denying her motion for severance. She maintains that the indictment contains no allegations showing that all the substantive counts relate to one conspiracy, and there are no facts reflecting a substantial identity of facts or participants between the substantive counts. Additionally, she maintains the "sheer numbers of both the previously convicted co-defendants and the number of their prior convictions weighs against [her] right to a fair trial regardless to any jury instructions." Her argument is unavailing.

The denial of a motion to sever is reviewed for abuse of discretion. United States v. Rocha, 916 F.2d 219, 227 (5th Cir. 1990), cert. denied, 111 S. Ct. 2057 (1991). A defendant seeking severance bears the burden of showing the specific and compelling prejudice that the trial court was unable to protect against and that resulted in an unfair trial. United States v. Kane, 887 F.2d 568, 571 (5th Cir. 1989), cert. denied, 493 U.S. 1090 (1990).

FED. R. CRIM. P. 8 provides for the joinder of defendants and offenses, and joinder is the rule rather than the exception, especially when the individuals named in an indictment are charged with the same conspiracy. United States v. Erwin, 793 F.2d 656, 665-66 (5th Cir.), cert. denied, 479 U.S. 991 (1986). FED. R. CRIM. P. 14 provides for severance if it appears that a defendant will be prejudiced. In ruling on a rule 14 motion, the district court balances any prejudice to the defendant against the government's interest in the judicial economy of a joint trial. Erwin, 793 F.2d

at 665. Severance will be justified if the prejudice cannot be cured by a cautionary jury instruction. United States v. Becker, 569 F.2d 951, 964 (5th Cir.), cert. denied, 437 U.S. 865 (1978).

Spears filed a motion to sever, which the district court denied, noting that Spears alleged she would be prejudiced because she did not have a prior criminal record although her co-defendants did and that misjoinder occurred because she was named in only one count of a ten-count indictment. The district court noted that persons indicted together normally are tried together, especially in conspiracy cases, unless it would appear that a defendant would be prejudiced. The court reasoned that Spears would not be prejudiced because "considering the number of defendants and offenses alleged to be involved, the government's interest in a joint trial outweighs the Defendant's allegation of prejudice." Furthermore, the court reasoned that cautionary instructions to the jury could cure any potential prejudice.

The district court specifically instructed the jury to compartmentalize the evidence against each defendant on each count. Spears did not object to, or in any way attack, the district court's limiting instructions. Spears has not shouldered her burden of demonstrating specific and compelling prejudice. See United States v. Long, 894 F.2d 101, 103 (5th Cir. 1990). In fact, she concedes that the "bad reputations or past crimes of a co-defendant do not, ordinarily, justify severance."

Additionally, a review of the indictment indicates that Spears and her co-defendants were charged with committing the same

conspiracy, namely, the distribution of speed. The joinder of defendants under rule 8 was not improper. See Erwin, 793 F.2d at 665-66. Because (1) the initial joinder was proper under rule 8; (2) the district court gave a cautionary jury instruction; (3) Spears did not object to, nor attack the instruction; and (4) Spears failed to provide evidence demonstrating specific and compelling prejudice, the district court did not err in denying her motion to sever.

III.

Spears contends that the district court erred in denying her motion to suppress evidence obtained pursuant to a search warrant. She argues that the search warrant lacked probable cause and that the affidavit supporting the warrant was "so lacking in the indicia of probable cause that the good faith exception does not apply in that no well trained officer could reasonably believe that [the warrant was] valid . . . ." She avers that some of the information in the affidavit was stale, although she does not maintain that the issuing magistrate judge was biased or that the information supplied by the affiant was untruthful or misleading. Her contention is unavailing.

The district court denied Spears's motion to suppress, noting that although some of the information contained in the supporting affidavit was obtained in 1990, additional corroborating information was obtained in May 1991, which provided sufficient evidence to relate Spears "to an on-going, long-standing pattern of criminal

activity." The court thus determined that probable cause existed and that even if the information in the affidavit was stale or probable cause was lacking, the court was "persuaded" that the "`good faith'" exception would apply.

We need not address the issue of probable cause when a determination of the issue of police officers' good-faith reliance upon a search warrant will dispose of an appeal. United States v. Craig, 862 F.2d 818, 820-21 (5th Cir. 1988). A district court may not exclude evidence obtained as the result of a search based upon an invalid warrant if the officers that executed the warrant acted in objective good-faith reliance upon the validity of the warrant. United States v. Leon, 468 U.S. 897, 922-23 (1984). No good-faith reliance exists whenever a warrant is based "on an affidavit `so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" Leon, 468 U.S. at 923 (quoting Brown v. Illinois, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part)).

Probable cause for a search exists "so long as the magistrate had a `substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing." Illinois v. Gates, 462 U.S. 213, 236 (1983) (quoting Jones v. United States, 362 U.S. 257, 271 (1960)). "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific `things' to be searched for and seized are located on the property to which entry is sought." Zurcher v. Stafford Daily, 436 U.S. 547, 556 (1978)

(footnote omitted).

The reviewing court examines de novo a district court's determination of good faith. United States v. Tedford, 875 F.2d 446, 448 (5th Cir. 1989). "[T]he determination of good faith will ordinarily depend on an examination of the affidavit by the reviewing court." Craig, 861 F.2d at 821 (quoting United States v. Gant, 759 F.2d 484, 487-88 (5th Cir.), cert. denied, 474 U.S. 851 (1985)). The reviewing court should examine the affidavit and construe it "`in a common sense and realistic manner,'" with conclusions based upon the "`laminated total'" of available facts." Id. (citations omitted). In reviewing rulings on motions to suppress, the district court's factual findings are accepted unless clearly erroneous. United States v. Adekunle, 980 F.2d 985, 987 (5th Cir. 1992), cert. denied, 113 S. Ct. 2380 (1993).

The district court denied Spears's motion to suppress without an evidentiary hearing. As Spears's attorney stated, the motion to suppress "presented only a question of law and the sufficiency of the affidavit . . . ."

The affidavit was signed on June 19, 1991. A number of the affidavit's paragraphs concern information regarding suspected drug activity at Spears's residence from June 1989 through December 1990. Both Maxwell and Royals were connected to Spears's residence. The affidavit further states that on May 15, 1991, police officers interviewed a confidential informant "who advised that Karen SPEARS was being supplied methamphetamine/amphetamine by Mike ROYALS and was distributing methamphetamine/amphetamine from her

(SPEARS') residence . . . ."

The affidavit also says that prior to Royals's arrest, "numerous individuals were observed coming and going to and from [Spears'] residence" but that after Royals's "arrest on April 29, 1991[,] the number of individuals decreased. Since ROYALS has been released from jail the number of individuals coming and going has picked back up. Most of these individuals are known drug users and traffickers." The affidavit indicates that police officers interviewed a confidential informant on June 17, 1991, who had been in frequent contact with a known speed trafficker who, in the confidential informant's presence, contacted Spears about obtaining speed. The informant also observed this individual coming and going from Spears's residence.

The district court "determined that the affidavit was not based on information that was knowingly false or made with reckless disregard for the truth." Furthermore, the court noted that Spears made "no argument that the issuing magistrate in any way abandoned his neutral and detached role." On appeal, Spears does not contest these findings but asserts "the good faith exception does not apply . . . ." Spears has offered a conclusional allegation only, concerning the lack of good faith.

A de novo review of the district court's determination of good faith supports its position. The confidential informants' information was corroborated by "[s]urveillance on the residence of Karen SPEARS . . . ." The affidavit is not facially deficient or "`so lacking in indicia of probable cause as to render official

belief in its existence entirely unreasonable.'" Leon, 468 U.S. at 923. The district court did not err in denying Spears's motion to suppress.

IV.

Spears asserts that the district court erred in denying her a sentence reduction for acceptance of responsibility. She maintains that she never denied her guilt and that "although she preceded [sic] to trial after the withdrawal of a guilty plea over a dispute as to drug quantity, such was a legal issue and not a matter of denial of guilt."

A district court's determination of whether a defendant has accepted responsibility is entitled to even greater deference than that accorded under a clearly erroneous standard of review. United States v. Mourning, 914 F.2d 699, 705 (5th Cir. 1990). The burden is on the defendant to demonstrate acceptance of responsibility clearly and affirmatively. U.S.S.G. § 3E1.1(a); See United States v. Fields, 906 F.2d 139, 142 (5th Cir.), cert. denied, 498 U.S. 874 (1990).

Only in rare instances will we find error in the denial of acceptance of responsibility when the denial is based upon a defendant's decision to stand trial. United States v. Pofahl, 990 F.2d 1456, 1485 (5th Cir.), petition for cert. filed (U.S. Aug. 4, 1993) (No. 93-5526). Those rare instances "may exist where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt, such as a constitutional challenge to a

statute or to the applicability of the statute to his conduct." United States v. Broussard, 987 F.2d 215, 224 (5th Cir. 1993).

Spears initially entered a guilty plea pursuant to a written agreement but withdrew the plea at sentencing because of a disagreement with the contents of the PSR concerning the amount of drugs attributable to her. At trial, she did not contest the constitutionality of a statute or the application of a statute to her behavior. At sentencing the second time, she again contested the drug quantity attributed to her. She has not plainly demonstrated her acceptance of responsibility for her conspiracy activities, nor has she shown why we should not accord the district court the deference due on its ruling.

AFFIRMED.